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THE RELEVANCE OF DEFENDANTS' WEALTH FOR FORWARD-LOOKING, BACKWARD-LOOKING, AND MIXED ACCOUNTS OF TORT DAMAGES

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INTRODUCTION

One of the toughest tasks that jurors confront is making a determination of what dollar sum to attribute to a plaintiff's non-economic losses—i.e., losses that are to a plaintiff's wellbeing and that are not monetary in nature. In these cases, jurors are often provided little guidance about how to determine what is the appropriate monetary award for a given loss of well-

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being.[1] As a result, damages awards for two plaintiffs with factually similar cases can often be drastically different, thus raising various concerns, not the least of which is horizontal inequity among plaintiffs.[2]

In almost all states, plaintiffs are currently unable to recover for a particular subset of non-economic losses where the loss in wellbeing is due to a loss of years of life that the deceased victim will no longer experience (the decedent's "hedonic loss").[3] It has, however, increasingly been argued[4] (and plausibly so, in my view) that the law should be changed to allow recovery for hedonic loss—which is arguably among the greatest harms that a person can incur. What is far from clear, however, is how we should determine the dollar sum to attribute to lost years of life. This is a question that is even more challenging than the question of how to determine an appropriate monetary remedy in cases of non-economic losses that do not involve death; and, as a result, the task that jurors (and judges) would confront in this subset of cases, if recovery were to be allowed for a decedent's hedonic loss, would be particularly difficult.

In order to empower judges and juries to satisfactorily approach cases of hedonic loss, I have, elsewhere, articulated and defended a proposal for how to determine damages sums in these cases, and I have articulated a framework for how judges and juries can employ my proposal.[5] As with other proposals that have been offered for hedonic-loss damages, my proposal is "forward-looking," in that it focuses on bringing about optimal

1. *See generally* Edith Greene & Brian Bornstein, *Precious Little Guidance: Jury Instruction on Damage Awards*, 6 PSYCHOL., PUB. POL'Y, & L. 743 (2000).

2. *See* James F. Blumstein, *Making the System Work Better: Improving the Process for Determination of Noneconomic Loss*, 35 N.M. L. REV. 401, 405, 410 (2005) (providing evidence for the great variability of non-economic damages awards); Roselle Wissler et al., *Decisionmaking About General Damages: A Comparison of Jurors, Judges, and Lawyers*, 98 MICH. L. REV. 751, 808–10 (1999) (finding a large degree of horizontal inequity in non-economic damages awards in a sample of awards by mock jurors, but finding substantial vertical equity in the same sample).

3. A small minority of "hedonic-loss states" (Arkansas, Connecticut, Hawaii, New Hampshire, and New Mexico) do allow compensation for "hedonic loss" incurred by the decedent as a result of his lost years of life. *See* Durham v. Marberry, 156 S.W.3d 242 (Ark. 2004); Katsetos v. Nolan, 368 A.2d 172 (Conn 1976); Montalvo v. Lapez, 884 P.2d 345, 364 (Haw. 1994); Marcotte v. Timberlane/Hampstead school District, 733 A.2d 394 (N.H. 1999); New Mexico St. § 41-2-1; Smith v. Ingersoll-Rand Co., 214 F.3d 1235,1245 (N.M. 2000).

4. *See, e.g.*, Eric A. Posner & Cass R. Sunstein, *Dollars and Death*, 72 U. CHI. L. REV. 537 (2005); CASS SUNSTEIN, VALUING LIFE: HUMANIZING THE REGULATORY STATE (2014); Robert Cooter & David DePianto, *Community Versus Market Values of Life*, 57 WM. & MARY L. REV. 713 (2016); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 889-91, 941-42 (1998); W. Kip Viscusi & Joni Hersch, *Saving Lives Through Punitive Damages*, 83 SO. CAL. L. REV. 229 (2010).

5. *See* Michael Pressman, Hedonic-Loss Damages that Optimally Deter: An Alternative to "Value of a Statistical Life" that Focuses on Both Decedent *and* Tortfeasor, 72 HASTINGS L.J. (forthcoming 2021).

deterrence of future potential tortfeasors.[6] But my approach is drastically different from the prior accounts of others[7] in a few key ways. Notably, I argue that optimal deterrence is brought about by having a tortfeasor "internalize" the *happiness*[8] loss to the decedent due to the lost years, rather than internalizing the (arguably incoherent notion of the) money loss to the decedent due to the lost years. Accordingly, I argue that we should not translate the happiness loss to the decedent into a monetary loss on the decedent's "utility curve"[9] and then have the tortfeasor internalize this cost. Instead, I argue that what we should do (in order to bring about optimal deterrence) is translate the decedent's loss of happiness into a monetary sum on the *tortfeasor's* utility curve; we should determine how much well-being was lost by the decedent and then determine what monetary sum, if paid by the tortfeasor in damages, would optimally deter the tortfeasor. As a result, a key and novel feature of my account, which is distinctly different from other approaches in the literature, is that *the wealth of the tortfeasor* is of great relevance to the appropriate damages sum.

In this Article, I explore the question of whether the proposal that I offer for death cases generalizes to cases that do not involve death. In particular, I focus on whether the key feature of my proposal (according to which the wellbeing loss to the victim should be translated into money on the *tortfeasor's utility curve, as opposed to on the victim's utility curve*) is and/or should be implemented for determining damages in non-death cases. Relatedly, I thus explore whether the tortfeasor's wealth should be relevant for determining the damages sum in non-death cases.

In short, I will argue in this Article that my analysis regarding damages in death cases indeed does provide us with important insights about tort law more generally: Even in cases not involving death, optimal damages sums (from a forward-looking perspective) should in theory be determined

6. In what follows, I will explain why my proposal (and those of others) in the death context are "forward-looking" and focus only on bringing about optimal deterrence. I will also explore at length the questions of when, why, and how so-called "backward-looking" accounts (according to which the goal of tort law is not deterrence, but, rather, providing compensation that makes a plaintiff whole), are part of the full picture and how they might interact with forward-looking accounts.

7. In the course of making my arguments against the "VSL approach" (*see* Part I, *infra*, for an explanation of what the VSL approach involves) and in favor of my proposed alternative, I argue against current wisdom on the topic, including the views of Sunstein, Posner, Viscusi, Polinsky, Shavell, Arlen, and Geistfeld, among others.

8. Throughout this Article, I will frequently use the words "happiness," "utility," and "wellbeing." I intend for all of these words to be synonymous, and I intend for each of them to be understood broadly enough to capture just about any view that the reader might have about the goodness in life that makes life worth living.

9. A utility curve is a graph that plots utility on the y-axis as a function of some good (e.g., money) on the x-axis, thus (in the case of money) showing how a person's utility level varies as a function of how much money he or she has.

by exploring the tortfeasor's utility curve and not that of the plaintiff. In this Article, I explore cases not involving death and explain why, despite prima facie appearances to the contrary, my account is both descriptively and normatively plausible in this context—at least in theory, even if not in practice. In practice, however, as I explain, considering only the plaintiff's utility curve in cases not involving death can often be justified either by its greater administrability, by other practical efficiency benefits that can be effectuated by doing so, or by giving weight, intrinsically, to the prescriptions of a "backward-looking" account of tort law. This is different from the case of death, however, where I argue that (1) from a forward-looking perspective, the defendant's utility curve should be used *even in practice*, and (2) "backward-looking" accounts of tort law arguably do not apply—thus meaning that the prescriptions of the forward-looking account arguably constitute the full picture.

In sum, the discussion in this Article will serve a few different purposes. For one, it will provide insights regarding the theoretical underpinnings of tort damages, insights regarding the theoretical underpinnings of deterrence, and insights regarding willingness-to-pay theory and economic theory more generally. My analysis casts doubt on foundational assumptions underlying the law-and-economics literature—in particular, the assumptions regarding the relevance of the plaintiff's utility curve for exploring deterrence—and, simultaneously, my analysis provides a new framework that law-and-economics theorists should employ. Second, it will also provide further support for my proposal regarding how to determine appropriate damages awards for hedonic loss in wrongful death cases. Third, and most tangibly, it will speak to the question of whether, and if so in which ways, the tortfeasor's prior or prospective wealth should be relevant to the damages determinations in non-death cases. Answering these questions regarding whether—and, if so, how—judges and jurors can and should use this information, and what kind of guidance juries can and should be given on this topic, will be of great importance if we hope to have a system where there is consistency and rationality in damages awards.

While the discussions and conclusions here will not purport to constitute a full resolution of these issues—far from it—my hope is that they orient us in a productive direction and, thus, constitute a fruitful beginning.

The Article proceeds as follows. Part I provides background regarding the problem I am aiming to solve in the context of wrongful death lawsuits, and it explains my proposed solution. Part II explores whether my proposal can and should be applied to cases not involving death. It explores both whether the proposal applies, in theory, to non-death cases and, if so,

whether it should also, in practice, be implemented in non-death cases. Part III then explores what the practical upshots are of my conclusions; it addresses (1) to what extent, if at all, courts and juries should implement in non-death cases the proposal I espouse for death cases, and (2) if they should, how they should do so.

I. BACKGROUND: MY PROPOSAL FOR HOW WE SHOULD CALCULATE DAMAGES SUMS FOR HEDONIC LOSS

Before beginning, the reader should note that the text in this three-page Part, which provides background for the Article's main contributions in Parts II and III, *infra*, includes a few short excerpts from my articulation, elsewhere, of my proposal for determining hedonic-loss damages sums in wrongful death cases.[10] These excerpts are included here (1) to improve the reader's understanding of the later portions of this Article, and (2) for the reader's convenience—so he or she need not search for the relevant discussions in the article from which the excerpts are taken.

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In almost all states, plaintiffs in wrongful death suits are unable to recover for the decedent's "hedonic loss"—the loss of happiness incurred as a result of the lost years of life themselves.[11] In those few states in which they can, they often do not; and, even when they do, there is much confusion and inconsistency in determining damages sums.[12] Because the decedent is dead and cannot be compensated, this omission may not be a mistake on a backward-looking account of tort law, according to which the purpose of tort law is to provide just compensation. But Cass Sunstein and Eric Posner have argued that the unavailability of damages for hedonic loss is highly problematic on a *forward*-looking account of tort law, which seeks to bring about optimal incentives for future potential tortfeasors. [13] According to them, because tortfeasors are not currently required to internalize all of the costs of their torts, the status quo results in underdeterrence of activities causing death.[14] I agree with Sunstein and Posner on this score. The next step, however, is to determine what dollar sum should be assigned to the loss of life. Answering this question is tricky

10. *See* Pressman, *supra* note 5.
11. *See supra* note 3.
12. *Id.*
13. Posner & Sunstein, *supra* note 4.
14. For another article exploring this point, see generally Jennifer Arlen, *An Economic Analysis of Tort Damages for Wrongful Death*, 60 N.Y.U. L. REV. 1113 (1985).

because, while in typical cases of valuing loss we can rely on a plaintiff's willingness to pay/accept, in the context of death we cannot do so because (leaving aside motivations like altruism) people would not accept any dollar sum in exchange for their lives. Thus, we seemingly must pursue a construct.

Sunstein and Posner argue that tort law should adopt a version (and ideally a more individuated version) of the "value of a statistical life" ("VSL"), which is employed by regulatory law to value lives for cost-benefit analyses.[15] In short, VSL determines the dollar sum that is the cost of a lost life by extrapolating from labor-force decisions and consumption decisions where people pay/accept certain sums of money to avoid/incur an increased chance of death of 1/10,000.[16] Sunstein and Posner and numerous other legal scholars advocating for the use of VSL in tort law recognize that there are a number of serious concerns about the chain of inferences employed in using VSL.[17] For instance, do people truly make such labor-force decisions freely? And do they know what the probabilities of death they confront are? Sunstein and Posner argue that these are merely questions of fine-tuning and that, while the numbers can be refined, the general approach is correct.[18] Further, since 2005, Sunstein and numerous other legal scholars have worked to fine-tune the VSL approach.[19] Thus, the VSL approach is the dominant framework for thinking of how tort law should determine a dollar sum for hedonic loss.

I, however, believe that the VSL approach is mistaken—and for reasons wholly separate from the "fine-tuning" issues that do indeed plague it. In what follows, I briefly explain why and I describe my proposed alternative.

If we are to provide a monetary remedy for the loss of happiness to the decedent (as I agree we should, so as to bring about optimal deterrence), we will at some point need to translate the lost happiness into a monetary sum. The VSL approach does so on the decedent's utility curve, thus taking the

15. Posner & Sunstein, *supra* note 4.

16. *Id.*

17. *See id.*; Cass R. Sunstein, *Valuing Life: A Plea for Disaggregation*, 54 DUKE L.J. 385 (2004); Cass R. Sunstein, *Lives, Life-Years, and Willingness to Pay*, 104 COLUM. L. REV. 205 (2004); Cass R. Sunstein, *The Value of a Statistical Life: Some Clarifications and Puzzles*, 4 J. BENEFIT-COST ANALYSIS 237 (2013); SUNSTEIN, VALUING LIFE: HUMANIZING THE REGULATORY STATE, *supra* note 4; Cooter & DePianto, *supra* note 4; Polinsky & Shavell, *supra* note 4; Hersch & Viscusi, *supra* note 4.

18. Posner & Sunstein, *supra* note 4.

19. *See, e.g.*, SUNSTEIN, *supra note* 4; Cooter & DePianto, *supra* note 4; Polinsky & Shavell, *supra* note 4; Viscusi & Hersch , *supra* note 4.

decedent's wealth into account,[20] but this is a mistake. That this is a mistake can be shown in a few ways, one of which is the following:

An individuated VSL approach would give us the result that someone who is very poor ("Poor") might have a VSL of, say, $100, whereas someone who is very rich ("Rich") might have a VSL of, say, $1,000,000 (as a result of the differing amounts that they would spend to avoid a 1/10,000 chance of death). This would give us the result that a tortfeasor would incur a cost of only $100 if she kills Poor, but a cost of $1,000,000 if she kills Rich. In addition to it seeming, equitably, that the decedent's wealth should not be relevant to the damages, this disparity is also suboptimal from an efficiency standpoint. Stipulating that the happiness loss to Rich and Poor as a result of their premature deaths is the same, optimal incentives would induce the same care to prevent their deaths. The VSL approach therefore risks greatly under-deterring the killing of Poor and greatly over-deterring the killing of Rich. What this shows us is that the happiness-to-money translation is happening at the incorrect point in the analysis of this topic.

Although the disparity in damages between Rich and Poor could be avoided by employing a uniform VSL sum, we should ideally, in my view, have an individuated tort system; and, crucially, even a uniform VSL sum would be inefficient because it is the *tortfeasor's* wealth—not the *decedent's*—that is relevant for determining optimal incentives.[21] For the incentives to be optimal, we want the potential tortfeasor to internalize the amount of *happiness loss* that would be incurred by the decedent. This means that the tortfeasor should be incentivized to expend up to the amount of happiness that would be lost by the victim (if killed) to prevent this loss of the victim. These incentives would be brought about by having a damages rule that would force the tortfeasor to incur this happiness loss when paying tort damages. Damages thus should be set at the dollar sum that, if paid by the tortfeasor, would bring about a happiness loss to the tortfeasor equal to the happiness loss incurred by the decedent as a result of his premature death. Thus, on my account, the happiness-to-money translation occurs on the tortfeasor's utility curve. This is importantly different from the VSL approach, which carries out the happiness-to-money translation on the decedent's utility curve.[22]

Having identified this problem with the VSL approach and having articulated, in theoretical terms, my alternative proposal that will avoid the problems that I have identified with the VSL approach and which (unlike

20. *See, e.g.*, Posner & Sunstein, *supra* note 4.
21. For a discussion of this topic, see generally Pressman, *supra* note 4.
22. *See, e.g.*, Posner & Sunstein, *supra* note 4.

the VSL approach) will provide optimal incentives, I now turn to articulating in greater detail how to carry out my alternative proposal—i.e., how to determine the dollar sum to attribute to a decedent's hedonic loss when we carry out the happiness-to-money translation on the tortfeasor's utility curve instead of on the decedent's.

There are two main steps to this process, both of which involve a number of sub-steps and sub-sub-steps. The first main step in carrying out my theory is to determine what the relevant amount of happiness loss was. The second main step is to translate this amount of happiness loss into a dollar sum on the tortfeasor's utility curve.

Now, to provide slightly more detail: The first step is to determine what the relevant amount of happiness loss is. This step has a few subparts. The first sub-part involves, first, the theoretical step of determining whether we want to focus on expected loss or actual loss, and second, the partially theoretical and partially empirical step of determining whether to focus on the loss (or foreseeable expected loss) to the decedent or the (foreseeable expected loss) to a larger group of possible or foreseeable decedents.

The second sub-part involves the theoretical and empirical step of determining how much happiness this person or group of people lost. This sub-step itself involves a few nested sub-steps. First, we need to make empirical estimates about the person's future. We need to estimate both how many years of life the person would have lived if not for the tort, and we need to estimate how happy these years would have been for the person. After having established how many years the person was expected to have lost and how much happiness the person was expected to have in those years, the next key step in determining how much happiness was lost by the person is to determine which "aggregation function" is the relevant one for determining what the happiness amount is for that whole chunk of years, given the inputs that we have already determined quantities for.

In articulating these steps, I offer a variety of metrics (e.g., a one-to-five scale for quantifying happiness level) and procedures (including a process involving rebuttable presumptions of average happiness and life expectancy and how these presumptions can be rebutted by evidence introduced by the parties).

At this point we will have come to a determination of how much happiness was lost. The second main step in carrying out my proposal is to determine how much of a monetary loss to the tortfeasor would bring about a happiness loss of this amount to him. I propose a method for doing this that will involve taking as evidence the tortfeasor's expected number of

years remaining and expected happiness (using similar metrics and presumptions as in the analysis of the decedent), and then using a method similar to, but importantly different from, the VSL-type data for determining a schedule of how the decedent would trade off money and years of life. This would enable us to determine what dollar sum in damages would bring about a loss in wellbeing to the tortfeasor that would equal the wellbeing loss that the decedent incurred as a result of his premature death. A key feature of this account is that highly relevant to the damages sum will be a determination of how wealthy the tortfeasor is. All else equal (and making the commonly accepted assumption that there is diminishing marginal utility of money), the wealthier the tortfeasor, the higher the damages sum would have to be to bring about any particular loss of happiness to him.[23]

This, of course, is merely a sketch of how my proposal works. There are additional questions about how this will be implemented—many of which I address elsewhere,[24] and some for which specific details still remain to be ironed out.

23. My account introduces a few moving parts, and one of these is the relevance of a defendant's wealth for the damages sum representing the decedent's hedonic loss. Although what I'm proposing constitutes a novel approach to damages for hedonic loss, there is, however, another area of the law that can be used as a blueprint for my proposed use of the tortfeasor's wealth. (Note that it is also the case that on an individuated VSL account, one party's wealth would be relevant as well—albeit the wealth of the decedent rather than that of the defendant—so it too would have this feature.) Although a defendant's wealth typically is not admissible for the determination of damages, there is a context in which the defendant's wealth typically is admissible for the determination of damages: punitive damages award determinations. (There is, however, an ongoing debate about whether punitive damages calculations *should* consider the wealth of the defendant, and about various related sub-issues. *See* Leila C. Orr, *Making a Case for Wealth-Calibrated Punitive Damages*, 37 LOY. L.A. L. REV. 1739 (2004); *see also* Keith N. Hylton, *A Theory of Wealth and Punitive Damages*, 17 WIDENER L.J. 927 (2008); *but see* Kenneth S. Abraham & John C. Jeffries, Jr., *Punitive Damages and the Rule of Law: The Role of Defendant's Wealth*, 18 J. LEGAL STUD. 415 (1989) (arguing that a defendant's wealth is irrelevant to the goal of deterring socially undesirable conduct and thus should not be considered in assessing punitive damages).) Because a defendant's wealth can be relevant in the context of punitive damages, the context of punitive damages can be used as a blueprint for how a defendant's wealth can be used in the context of damages awards for a decedent's hedonic loss. Thus, in determining the procedures and practices regarding how to have the damages sum be a function of the defendant's wealth (and also in considering various concerns that might arise in doing so), we can look to the punitive-damages context for guidance. (While various potential problems could arise when courts (and juries) consider a defendant's wealth to be relevant for the determination of damages, one such potential problem is the concern that juries might use information about defendants' wealth in impermissible ways. For example, juries might be tempted to make the deep-pocketed defendant pay a large sum in damages just because he can, and the jury might be seeking to do what in their view might be furthering distributive justice in society. This concern and a variety of related ones are serious and must be carefully guarded against. There are, however, ways in which the law deals with these types of concerns, and, in my view, these are probably sufficient. Once again, we can look to the context of punitive damages for guidance both regarding possible problems to watch out for and, also, regarding possible solutions to these problems.)

24. *See generally* Pressman, *supra* note 5. There, among various other things, I also consider the concern that could be raised about whether the use of tort law (in the way I propose) is the best legal machinery we have (as opposed to, say, criminal law or punitive damages) for pursuing the goals that my proposal attempts to fulfill.

II. EXTENDING MY PROPOSAL TO TORT LAW MORE GENERALLY

A. Introduction

Up until now, I have been discussing my proposal in the context of providing a remedy to wrongful death plaintiffs for decedents' hedonic losses. Now, however, I will argue that my proposal's claims about (1) optimal (forward-looking) incentives being brought about by damages rules that require tortfeasors to internalize the *happiness* cost that their activities impose on others, and (2) the relevance of using the tortfeasor's utility curve, also apply, much more broadly, to tort law on the whole. I argue that in order for tort law to bring about optimal incentives, tort damages should always require tortfeasors to internalize the *happiness* costs that their activities impose on others, and that translating happiness to money on the *defendant's* utility curve is of key importance in doing so. This is a normative claim. The law, I argue, should do this if it wants to bring about optimal incentives going forward for potential tortfeasors. I also will provide, in part, a descriptive version of this claim: I argue that in most—though, not in all—situations, the damages measure in tort that is currently used is indeed both consistent with and ultimately rooted in the rationales behind these arguments of mine.

This descriptive claim may seem surprising, and that is because, as I will show below, in most cases it seems that tort law does not use the defendant's utility curve but instead typically uses the plaintiff's utility curve.[25] (Indeed, the ubiquity of using the plaintiff's utility curve is the reason why it was assumed by proponents of VSL, and seemingly all others, that we must use the plaintiff's utility curve in our attempt to determine the damages sum to attribute to a plaintiff's hedonic loss in a wrongful death suit).[26] I will show, in what follows, why we typically use the plaintiff's utility function in determining a damages sum, and why this common way of determining damages is not inconsistent with my theory. I will also, however, show that there are some situations in which using the plaintiff's utility function is *not* consistent with my theory, and I argue that in these situations it is our practices that should be revised.

Thus, interestingly, while I originally set out to provide a plausible account of what dollar sum for hedonic-loss damages in wrongful death suits would provide optimal incentives going forward for future potential tortfeasors, it turns out that exploring that context enables us to learn some-

25. *See, e.g.*, Posner & Sunstein, *supra* note 4.
26. *Id.*

thing more fundamental about tort law on the whole—and this more fundamental insight was previously obscured in non-death contexts.

If the arguments in this Part are successful, they will not only provide support for my claims about tort law on the whole, but they will also reinforce my arguments in the context of death. After all, support for my theory broadly construed is also support for one of the specific applications of this approach, namely, in the context of hedonic-loss damages in wrongful death suits.[27]

One final note: Throughout the bulk of this Part (up until Part II.C), I will be focusing exclusively on a forward-looking account (i.e., on an account that seeks to provide efficient incentives) and will not be considering a backward-looking (plaintiff-compensation-focused) account. This indeed has been the case throughout the discussion so far, but I flag this here, in particular, for a reason. As I have stated, some view tort law's purpose as being a forward-looking one, some view it as a backward-looking one, and some view it as both.[28] In the context of death cases, however, since arguably no compensation for the hedonic loss is possible, I have been focusing exclusively on the forward-looking approach. In non-death cases, however, arguably both lenses are available. Thus, when this Part (until Part II.C) only considers matters from a forward-looking perspective (that is, only *intrinsically* from a forward-looking perspective; this Part *will*, at various points, consider a backward-looking perspective, but only instrumentally for how it plugs into the forward-looking account), it very likely is ignoring a key part of the picture—a backward-looking account. The bulk of this Part, thus, proceeds counterfactually, as though the forward-looking account is the only game in town. Only toward the end of this Part, in Part

27. *See generally* Pressman, *supra* note 5. It's important for the reader to keep in mind, though, throughout this Part, that for the purposes of my arguments, elsewhere, regarding a framework for approaching *damages in wrongful death suits for decedents' hedonic loss*, I need not offer a comprehensive theory of tort that is broad enough to also handle typical cases (i.e., cases of economic damages and cases of non-death non-economic damages). For the reasons I've stated, however, I do also want to provide a theory that is general and has broad reach, and thus I am attempting here to carry out that task. But one could reject my account broadly construed and yet accept the proposal in the context of damages in wrongful death suits for decedents' hedonic loss; the latter does not depend on the former.

28. For examples of well-known articulations of corrective justice theory (a main example of a backward-looking theory), see Ernest Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403 (1992); Jules Coleman, *The Practice of Corrective Justice*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 53 (David G. Owen ed., 1995); JULES COLEMAN, THE PRACTICE OF PRINCIPLE (2001); ERNEST WEINRIB, CORRECTIVE JUSTICE (2012). For examples of well-known articulations of the forward-looking, law-and-economics view, see GUIDO CALABRESI, THE COSTS OF ACCIDENTS (1970) and Richard Posner, *Wealth Maximization and Tort Law: A Philosophical Inquiry*, *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW (David G. Owen ed., 1995). For an example of an articulation of a view according to which tort law's purpose is both forward-looking and backward-looking, see Michael Pressman, *The Compatibility of Forward-Looking and Backward-Looking Accounts of Tort Law*, 15 U. N.H. L. REV. 45 (2016).

II.C, below, will I take a step back and consider both the backward-looking and forward-looking approaches. In that sub-part, I will explore how these approaches interact, how their interaction is relevant to the upshots of my proposal, and, more generally, how the death cases and non-death cases are different with respect to the two approaches to tort law and what the death cases can teach us about the relationship between the two approaches.

B. Extending My Proposal to Cases Not Involving Death

I have been arguing that in the context of hedonic-loss damages in wrongful death suits, we can bring about optimal incentives for future tortfeasors if we set the damages amount to an amount such that tortfeasors will be required to internalize the *happiness* cost that their activities impose on others, and that we can do so by carrying out the happiness-to-money translation on the tortfeasor's utility curve. Readers might wonder, however, why it is the case, if I am indeed right about the wrongful death context, that we do not use the same approach for more typical (i.e., non-death) cases, where we indeed usually use the plaintiff's utility curve. After all, it would seem as though the same underlying principles should apply in death contexts as well as non-death contexts, and that they thus should be treated similarly in this respect. In this Part, I explain what is going on in non-death cases and why the plaintiff's utility curve is being used in those cases.

For all of the following examples, I will consider both cases of economic damages and "cases of typical non-economic damages" (i.e., cases of non-economic damages but where the case does not involve death or any shortening-of-life issues). I first consider cases where the plaintiff is poorer than the defendant; next, cases of equal wealth; and last, cases where the plaintiff is richer than the defendant.

1. Cases where the plaintiff is poorer than the defendant

Let us assume first that, in terms of their wealth relative to one another, the plaintiff is poor and the defendant is rich. Thus, let us suppose the following chart articulates the exchange rates between money and utility at a few points on the two parties' utility functions. The analysis here makes the common assumption that people have diminishing marginal utility of money.

Poor plaintiff: 100 dollars equals 1,000 utils

Rich defendant: 100 dollars equals 10 utils

Rich defendant: 10,000 dollars equal 1,000 utils

First, let us consider a typical case of economic damages. Let us suppose that the harm to the poor plaintiff is 100 dollars. As a result of incurring this harm, he thus incurs a happiness loss of 1,000 utils. On my theory, the efficient rule would be one that (1) requires the rich defendant to compensate the plaintiff for the plaintiff's utility loss, and (2) uses the defendant's own utility function to arrive at the dollar sum. In this case, that would involve requiring the defendant, if found liable, to pay 10,000 dollars in damages for the poor plaintiff's 100-dollar loss. If this were the rule, the defendant would then spend up to 10,000 dollars in care to prevent the plaintiff's loss, because he would know that he would have to pay 10,000 dollars in damages if he does not take the appropriate amount of care, he causes the loss to the plaintiff, and he is found liable.

This, however, is not our current rule.[29] We do not require this defendant to pay damages of 10,000 dollars in this case. Instead, we allow the defendant to pay the 100 dollars, which, for him, represents a mere ten utils.

A similar situation (arguably) arises in typical cases of non-economic damages (i.e., cases not involving death or shortening-of-life issues). Suppose here that the poor plaintiff incurs pain and suffering and experiences a 1,000-util loss. In these cases, we arguably strive to make the plaintiff whole by giving him money that would put him (having experienced the utility loss from the tort and then having received monetary compensation) on the same indifference curve to where he would have been without the utility loss from the tort and without the compensation. Whether this indeed is what compensatory damages are supposed to do in non-economic damages cases could perhaps be debated, but this seems to be the most straightforward account of what is going on in these cases. Thus, in this situation too, the defendant would pay the poor plaintiff 100 dollars, and this would compensate him for the 1,000-util loss. This 100-dollar payment, however, would only cost the rich defendant himself ten utils.

The question, then, is why my theory says to use the defendant's utility function in the death case when it seems that in cases of economic damages and non-death cases of non-economic damages, we use the plaintiff's utility function. Am I saying that we should switch to using the defendant's utility function in these two cases as well? Or is there some explanation for why the death case is treated differently than these other two cases?

29. *See, e.g.*, Posner & Sunstein, *supra* note 4.

In order to create the optimal rule for future actors, we want to minimize the happiness costs jointly incurred when summing over the plaintiff and defendant. In these cases, we see that it would be inefficient for the rich defendant to expend up to 10,000 dollars in care, because he can expend merely ten utils and still restore the plaintiff to the happiness level at which the plaintiff had been. In other words, the disparity in wealth (and thus in the utility functions) allows for greater efficiency. Instead of being relegated to joint costs of 1,000 utils, we can keep the joint costs down to ten utils.

Thus, the fact that the plaintiff is alive and has a utility function (and, crucially, the fact that he is poorer than the defendant) enables us to have a way to be *even more efficient* than merely using the defendant's utility curve. The disparity in utility curves allows for the possibility of an efficiency-enhancing deal.[30] It is as though there is a bargain between the plaintiff and the defendant and that there is an area of consumer surplus and producer surplus where the two parties can gain from making the deal. The cost of producing the transfer of 1,000 utils would have been 10,000 dollars from the rich defendant, but the amount of utility needed to be transferred to the poor plaintiff would be satisfied by the plaintiff merely receiving ten dollars.

Thus, the underlying point still remains that the defendant's utility curve is used in order to figure out a "benchmark" amount of money that should be expended in order for the defendant to appropriately internalize the happiness-loss externality that he is imposing. Only then, however, after establishing this "benchmark," do we possibly move to the plaintiff's utility function if it enables an efficiency-enhancing "deal." Accordingly, the defendant's utility curve is of key importance to the analysis even in this case.

In the death case, however, no utility curve exists for the plaintiff, so we cannot use the plaintiff's utility function. Or, said differently, as a result of the plaintiff not being alive (and thus not having a utility function), no "efficiency-enhancing deal" can be carried out. Thus, we are stuck with using only the defendant's utility function.[31]

Furthermore, though, and to be clear: It is not the case that using the defendant's utility function is a "second-best option" that we resort to hav-

30. We could refer to the poor plaintiff as, due to his poverty, being an efficient bearer of pain and suffering and/or an efficient bearer of financial loss. (Of course, by this I mean he is an efficient bearer of these losses as compared to the defendant who, in relative terms, is "rich.")

31. As for the possible argument that we indeed can (and should) still use the decedent's prior utility function (i.e., from when he was alive) and see what he would have paid etc., I address this argument when discussing this topic head-on in Pressman, *supra* note 5.

ing to use when the primary option in determining damages (carrying out the happiness-to-dollars translation on the plaintiff's utility function) is not possible because the decedent is dead and does not have a utility function. Rather, the compensation that needs to be provided for the plaintiff's loss is a loss of happiness, and there is no "fact of the matter" regarding which person's utility function's translation of that happiness sum to money results in the "amount of monetary loss." It is arbitrary what we call the correct monetary sum, because that is context specific. If we want the sum that creates the optimal incentives, however, the first choice indeed is to turn to the *defendant's* utility function (and we do so *even if* the plaintiff is in existence and has a utility function). Next, we turn to the plaintiff's utility function to explore the possibility of there being an "efficiency-enhancing deal." Thus, the fact that we use the plaintiff's utility function in the typical case is just because it is more efficient (if the plaintiff is poorer than the defendant). We are not doing this because the plaintiff's utility function is, in any other sense, the "more correct one to use." The decedent's lack of a utility function simply represents yet another reason to use the defendant's utility function. But this additional reason is not an operative reason. The real point is that we would turn to the defendant's utility function anyway, even if the plaintiff were alive and did have a utility function. Only after turning to the defendant's utility function would we then turn to the plaintiff's utility function to pursue the possibility of an "efficiency-enhancing deal." When the victim is not alive, however, we do not turn to the plaintiff's utility curve to explore such a deal because, given the victim's death, no efficiency enhancement is possible.

2. Cases where the plaintiff and defendant have equal amounts of wealth

Now consider the possible case where the plaintiff and defendant have an equal amount of wealth. This case is very straightforward because both parties have identical utility functions, and it thus does not matter which one we use.

As in the instances explored above, I argue that even in cases of economic damages and non-death non-economic damages, we should use the defendant's utility curve for the happiness-to-money translation. Then, after doing so, we can turn to the plaintiff's utility function to see if there is the possibility for an efficiency-enhancing deal. Here, however, there is not a possibility for an efficiency-enhancing deal because both parties have the same utility curve. Further, although the common wisdom would be that the damages here reflect the plaintiff's utility curve, and although my theo-

ry would be that the damages are reflecting the defendant's utility curve, in this case they are the same. Thus, common wisdom and my theory come out the same way in this case, and it is not a test case that can be used to differentiate the common-wisdom theory and my theory and the prescriptions that these two accounts offer.

This covered the cases of economic damages and non-death non-economic damages. As discussed in the prior sub-sub-part, the goal of these sub-sub-parts is not to explore the death case, but, in that context, my account uses the defendant's utility curve, whereas the VSL approach (which I will, for our purposes here, call the "common wisdom" approach even though that does not represent the status quo, which is that no recovery is allowed for decedent's hedonic losses) determines the damages amount by looking at the decedent's utility function (i.e., his wealth).

3. Cases where the plaintiff is richer than the defendant

Now consider the case where the wealth disparity in the first sub-sub-part of these examples is flipped: i.e., where, in relative terms, the plaintiff is rich and the defendant is poor. Suppose that the following chart articulates the exchange rates between money and utility at a few points on the two parties' utility functions.

Rich plaintiff: 100 dollars equals 10 utils

Poor defendant: 100 dollars equals 1,000 utils

Poor defendant: 1 dollar equals 10 utils

Suppose now that there is a rich plaintiff who experiences an economic harm of 100 dollars, and that this economic harm thus causes him a loss of ten utils. On my account, the poor defendant would have to pay the plaintiff only one dollar in damages, because this is the cost of ten utils to the poor defendant. Our current legal system, however, requires a monetary payment of 100 dollars.

A similar situation arguably occurs in non-death non-economic damages cases: Suppose that there is a rich plaintiff who experiences pain and suffering that causes him a loss of ten utils. This ten utils for the rich plaintiff would be equal to 100 dollars. On my account, the poor defendant would have to pay the plaintiff only one dollar in damages, because this is the cost of ten utils to the poor defendant. Our current legal system, howev-

er, requires the monetary payment to be 100 dollars—just as it does in the analogous case in the context of economic damages, discussed above.[32]

So, what is my explanation of this case? In other words, why is it that our current legal system is using the plaintiff's utility function and having the damages sum be the sum that the plaintiff's utility function dictates? Of course, my general theory is that we should use the defendant's utility function. And then in the case of the plaintiff being poor and the defendant rich, I stated yes, the current legal system *does* use the plaintiff's utility function in cases of economic damages and cases of typical (non-death) non-economic damages, but this is not because the plaintiff's utility function intrinsically should be used. Rather, it is the defendant's utility function that is intrinsically being used, but we then switch to the plaintiff's utility function because the wealth disparity allowed for an efficiency-enhancing deal. Here, however, the wealth disparity is flipped, and thus there is no possibility of an efficiency-enhancing deal by turning to the plaintiff's utility curve. In fact, using the plaintiff's utility curve would be *less efficient* than using the defendant's utility curve. Turning from the defendant's utility curve to the plaintiff's utility curve would be an *inefficiency-enhancing deal*. Thus, what explains the current legal system's use of the plaintiff's utility curve in these cases? There seem to be three possible types of responses: (1) there is a good reason for this that can be explained by my account, (2) there is a good reason for this, but one that requires the rejection of my account, or (3) there is not a good reason for this, and the current state of the law thus should be changed.

Theoretically, I think that my account gets the answer right, and the poor defendant indeed should only have to pay one dollar in damages in these types of cases (assuming that they are not getting wealthier from committing the tort—a possibility I will consider below). In practice, though, I think that there are a host of reasons why we do things the way we currently do, and, in what follows, I will mention a number of these. Thus, my response is the first: In practice, there is good reason for the way the current system operates that can be explained by my account. As I will explain, though, it becomes an empirical question in particular instances about whether the current system is best or whether a shift should be made toward what my account prescribes in theory. Ultimately, I leave open these empirical questions about whether, and, if so, when, there are cases

32. And, similarly, in the death version of this example (i.e., in the death case where the plaintiff is the rich one and the defendant is the poor one), my account is saying (as it has in all of the past examples as well) that we should be using the defendant's utility function for the happiness-to-money translation. *See generally* Pressman, *supra* note 5.

where the current legal system should shift toward what my account prescribes in theory.[33]

Before exploring and addressing the various reasons for why we might be doing things the way we currently are doing them, I first elaborate a bit upon what my theoretical position amounts to. Recall that my theoretical position in these cases (of both non-death non-economic damages, *and of economic damages*), where the plaintiff is rich and the defendant is poor, is that the defendant should only have to pay one dollar of damages (when there is a 10-util loss). This might seem particularly shocking to the reader in the case of *economic* damages, where the loss to the rich plaintiff indeed was in dollar terms and, notably, was a loss of 100 dollars. My position, nevertheless, is that, theoretically, the poor defendant should only have to pay damages of one dollar, and this is the case *even in the case of economic damages*.

My position here amounts to a "happiness version" of the Hand Theorem,[34] and the specific case considered here, where the plaintiff is rich and the defendant poor and where the plaintiff is harmed either by incurring a 100-dollar loss (in the economic damages version of the example) or by incurring a 10-util loss due to pain and suffering (in the non-death non-economic damages version of the example) amounts to a situation where the burden of preventing the loss (again, quantified in terms of happiness) is so high that it is inefficient for more than a 10-dollar precaution to be taken. As a result, the failure of the tortfeasor to expend more than ten dollars on precautions is not considered negligent and the tortfeasor thus is not liable beyond ten dollars. (It would be negligent, on these facts, however, for the tortfeasor to have failed to have expended ten dollars. Thus, the

33. It's important to note, though, that even if there are only a few shifts, in practice, that should happen away from the status quo and toward what my theory prescribes (and even if there are *zero* such instances in practice), the points I make in this Part are still important—it's important to be clear about and realize *why* we're using the plaintiff's utility curve in the cases in which we do so. This is for three reasons. *First*, being clear about the topics here helps support my claim that my points and arguments in the death context are correct. My points here show that there indeed is underlying theoretical uniformity between the death case and these other more typical cases. Thus, I'm explaining away the differences by pointing to the practical explanations, and realizing this here helps support my points in the context of the death cases. *Second*, it might turn out there are other sub-areas in the law (even aside from the death context) where applying my proposal would indeed prescribe changes, so it is useful to become clear on it in theory even in the context I discussed. *Third*, even if there were no other areas where my account would prescribe change, it still would be valuable to arrive at an accurate understanding of why it is that the current state of the law is what it is, and according to my proposal, we have at the very least been operating with a misunderstanding and we have been wrong in our understanding of the rationale for the current state of the law.

Thus, regardless of how the theoretical and practical efficiency considerations end up weighing against each other on net, my proposal and my arguments in this Part will still remain valuable.

34. *See* United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947). The Hand Theorem, however, unlike the "happiness version" here, was generally formulated in monetary terms.

damages award that he would face if he failed to expend ten dollars of precautions in this case would be ten dollars.)

As a result of this use of a "happiness version" of the Hand Theorem, the losses beyond ten dollars would lie where they fall (i.e., with the plaintiff). While this might seem unfair, it is not different from other situations where the law lets the losses lie where they fall. These types of situations are ubiquitous; there are all sorts of situations in life where a person is harmed by another but where the harms do not give rise to a tort claim that the victim can bring against the tortfeasor.[35] Thus, in sum, my view is that my account, *at least as a theoretical matter*, gets these cases right when it states that the damages that the poor defendant should have to pay are one dollar (and, thus, when my account states that the current state of the law, which requires the defendant to pay 100 dollars, is making a mistake).

Having said this, various practical considerations may well make it the case that the current state of the law is (at least in most cases) all-things-considered justified, despite varying from the theoretical prescriptions of my account.

For one, for reasons of administrability, the law's position might simply be to say that it is so hard to know the differences in the utility curves among different people, so we just treat everyone as though they have the same utility curves. This then is more administrable. Relatedly, the law's position could be that, even aside from the difficulties of administrability, it could be that we are treating people's utility curves as being the same because we actually think it is most likely that they *in fact* are very similar across people. To the extent that the law, for either of these two reasons, is treating people's utility curves as being the same, then the divergence between my account's prescriptions and those of the current state of the law disappear—as evidenced by the fact that in the sub-sub-part where I considered the case where the plaintiff and defendant had equal wealth, I stated that there would be no divergence between my account and the status quo.[36] If this is what the law is doing, there would be a further question of why it decides to look to the plaintiff's utility curve rather than the defendant's (despite the fact that they are the same and that the choice is arbitrary), and the answer would be that it is easier this way. This is because, even on my account, the original calculation of the loss (in happiness) is determining the loss to the plaintiff. Thus, it is easier to only look at the plaintiff's utility curve. This is particularly obvious in the case of

35. *See, e.g.*, Palsgraf v. Long Island R.R. Co., 248 N.Y. 339 (1928).
36. *See supra*, Part II.B.2.

economic damages (where we just see what the dollar sum of the loss was), but it is also easier in the context of non-death non-economic damages.

Leaving aside the foregoing consideration, there are other strong practical reasons that might explain the current state of the law. The goal of my account was to maximize utility overall—and thus, assuming that no one other than the victim and potential tortfeasor are affected by the analysis, to minimize the joint utility loss for those two parties. Using the rule that my account dictates, however, could cause disutility in various ways, and this disutility could dwarf the efficiency gains my account otherwise would bring about.

For one, people might have certain engrained views and preferences about fairness and entitlements, and the prescriptions of my account might run afoul of these views and preferences. For example, one such view about fairness and entitlements that one might have is that a happiness-version of Hand Theorem should not be used, and that, instead, even if Person 1 is poor and Person 2 is rich, when Person 1 causes a 100-dollar harm to Person 2, Person 1 should have to pay back Person 2 with 100 dollars—and not with 1 dollar—even though Person 1 is poor and Person 2 is rich. (This engrained intuition about fairness is probably particularly strong and powerful in cases of economic damages like this one.) If people hold a view of this sort, it would likely cause great disutility for the legal system to implement an account that provides prescriptions that runs afoul of these norms. This disutility would likely be a sufficient reason to not implement my account, and it is not the only example of a possible view which, if publicly held, could provide a reason against implementing my account. The disutility brought about by having a legal system at odds with widely held norms is a real disutility that must be taken into account in the utility calculus. People are likely to experience disutility if they think the legal system is unfair.

Another practical concern is that this approach could give rise to various problems with incentives by discouraging productive behaviors and vice versa. Consider, for instance, the following case involving a rich person (Person 1) and a poor person (Person 2). Using the same utility functions as those given above, Person 2 will have an incentive to bring about a 100-dollar harm to Person 1 if Person 2 is able to obtain some of these 100 dollars as a benefit to himself. Indeed, he would want to do this if he could get more than one dollar of benefit, since he would only be liable for one dollar in damages as a result of his poverty. In an extreme case, this could involve Person 2 stealing the 100 dollars from Person 1 in order to bring

about a 99-dollar gain; a similar effect could be brought about in less extreme ways as well.

Although cases exhibiting the problematic incentive structure of the example above need not be limited to intentional torts, that context does provide a particularly stark example. Not only would this type of situation be an affront to people's norms of fairness, but the bad incentives and resulting instability of entitlements would likely also be terrifying, causing unrest and extreme disutility. While, of course, there could be other societal tools harnessed to prevent this type of behavior (e.g., punitive damages or criminal liability), it does not seem that we would want to have to rely on these types of tools to curb this behavior. Thus, employing my account across the board is not something we would want to do.[37]

In sum, people do not always want to be subject to the Hand Theorem. It is important to note, though, that the underlying wealth transfer from the rich plaintiff to the poor defendant that would be brought about by these behaviors *would indeed be efficient*. That is why my account, in theory, prescribes what it does. The problem, however, is that having a system that implements my theoretical account to that kind of an extreme brings about more than just a wealth transfer; it brings with it all sorts of behaviors (e.g., theft), like those described above, that can cause great disutility, and the sense of unfairness and unrest that people would feel would certainly dwarf the benefits.

This shows that my account should not be implemented in an extreme and unadulterated form. It is possible, however, that a more reigned-in version of my account could have potential. A reigned-in version of my account (which perhaps employs the defendant's utility curve in only a very circumscribed way and only allows for a minimal shift upward or downward in damages away from what the plaintiff's utility curve would dictate) could possibly bring about many of the benefits in efficiency of my theoretical account while perhaps avoiding the vast majority of the ways in which it might have brought about disutility in its unadulterated form. How these factors would weigh on net is an empirical question, and one that I will not further pursue here. There is a possibility, though, that a reigned-in version of my account could be what turns out, on net, to be optimal.

In sum, however, not only is it an empirical question whether a reigned-in version of my account would be optimal, but it is also an empirical question how all of the above considerations that could cause disutility

37. I emphasize here again that we should not take this to be an argument against employing my account in the context of wrongful death. (There is, however, an analogous objection that can be made in that context, which I respond to and which I discuss elsewhere. *See* Pressman, *supra* note 5).

would weigh out against potential efficiency benefits in any particular version of my account. Fully determining the answers to such empirical questions is beyond the scope of this Article.

The existence of practical disadvantages to my account (if implemented across the board) does not at all detract from the more general point that I am making here in this Part. Perhaps the law—outside of wrongful death cases—should stay as it is. But if so, this will only be because practical considerations militate against its general adoption; such considerations are no argument against the theoretical correctness of my account.[38]

4. Summary regarding the extension of my proposal to non-death cases

In sum, my rule coming out of the foregoing discussion is that the best situation, on net, is brought about by using the defendant's utility curve to determine the damages sum, but that two situations can cause it to be best all-things-considered to stray from this default and instead use the plaintiff's utility function: (1) if doing so allows for an efficiency-enhancing deal, or (2) if using the defendant's utility curve will, in practice, cause disutility and this disutility outweighs the efficiency gains in the particular case from using the defendant's utility curve.

The reader should, however, recall the disclaimers made at the beginning of this Part about how the bulk of this Part exclusively explores matters through a forward-looking lens—despite the fact that in the context of non-death cases there also is another lens that makes up part of the picture: the backward-looking lens. In what follows, I now take a step back and explore matters while considering, together, both the backward-looking and forward-looking lenses.

C. Expanding Focus to Include the Intrinsically Backward-Looking Account of Tort Law

1. The implications for my proposal of intrinsically taking into account both backward-looking and forward-looking views

Up until this point, I have been talking almost entirely about the forward-looking account (efficiency account) of tort law—according to which

38. I am able to leave these topics aside, without fully resolving the empirical questions, not only because I can simply satisfy myself with just articulating the *beginnings* of a broader theory for tort, rather than a fully worked out one, but, importantly, also because my theoretical work here is finished. I have made the analytical points pertaining to my topic, and the remaining issues are merely empirical questions. Thus, I can stop short of ironing out the empirical calculations.

the purpose of tort law is optimal deterrence (i.e., bringing about optimal incentives for future potential tortfeasors).[39] It is through this lens that I have explored both death and non-death cases. Although I have referred to the backward-looking account (the account focused on *compensation of the plaintiff*) in my discussions of death cases and non-death cases, I have only been discussing this account in these contexts in a particular and circumscribed way. More specifically, when I have discussed the backward-looking (plaintiff-compensation-focused) account, I have only been doing so *instrumentally, within the context of a forward-looking account*. In other words, I have been considering the backward-looking account only for the purpose of considering the fact that people often have intuitions of fairness that comport with a backward-looking account, and, thus, that a forward-looking account must take these intuitions at face value and treat any disutility caused by a legal system that conflicts with these intuitions as real disutility to be included in the calculus of determining what rule is optimal.

But this is not the whole picture. The backward-looking view is not merely a view that is relevant instrumentally because of how it plugs into the forward-looking view. Indeed, the backward-looking view is the view that many, if not most, people would say intrinsically describes the main purpose (or perhaps the *only appropriate* purpose) of tort law. And, while perhaps some would think that tort law is or should be viewed (intrinsically) only through a forward-looking lens and while perhaps some would think that tort law is or should be viewed (intrinsically) only through a backward-looking lens, many people would recognize that both lenses are and should be viewed as (intrinsically) relevant to tort law. Thus, most people would think that viewing tort law through a backward-looking lens is *at least part of* the picture. And because up until now I have only been considering a forward-looking account, I have not been taking into account the whole picture. But now I broaden my view and briefly consider the full picture.

Intrinsically valuing the backward-looking view of tort law could be a strong reason why in non-death cases we might want to use the plaintiff's utility curve. Recall that my forward-looking account prescribes using the defendant's utility curve unless (1) the plaintiff were poorer than the defendant (and thus there could be an efficiency enhancing deal by using the plaintiff's utility curve), or (2) tastes for fairness and similar factors would

39. The reader should note that the text here, in Part II.C, includes a couple of very short excerpts from my similar discussion in Pressman, *supra* note 5. These excerpts are included here (1) to improve the reader's understanding, and (2) for the reader's convenience—so he or she need not search for the relevant discussions in the article from which the excerpts are taken.

result in substantial disutility if the defendant's utility curve were used. But, now broadening the inquiry beyond a forward-looking view, we see another possibility: The plaintiff's utility curve is used perhaps because we either think that the backward-looking account is the only fundamental account of tort law; or, more probably, because we think that *both* the forward-looking and backward-looking accounts are fundamental, but, as a result of our hybrid account, valuing both the forward-looking and backward-looking accounts often leads us to use the plaintiff's utility curve. Although I did explain why, even if using a purely forward-looking account, we might use the plaintiff's utility function in the way that we do (due to the efficiency enhancing deal or due to the *instrumental* value of the backward-looking account—i.e., due to disutility caused by conflict between the law and intuitions in favor of the backward-looking view), it seems that the fact that we typically intrinsically value a backward-looking view is probably an even more straightforward explanation of why we seem to use the plaintiff's utility function in the way that we do.

Interestingly, however, the death cases are importantly different from the non-death cases with respect to these issues. Absent one thinking that the estate should be *compensated* for the decedent's hedonic loss, the death case seemingly provides us with a case where compensation is not possible yet deterrence is. Thus, even if one typically thinks that the forward-looking and backward-looking accounts of tort are both intrinsically part of the picture, it seems that death cases are unique in that compensation for (i.e., a backward-looking approach to) the hedonic loss is off the table, and all that remains is deterrence of (i.e., a forward-looking approach to) hedonic loss.[40]

2. What the death case enables us to learn about the interaction between the forward-looking and backward-looking accounts

Although I had originally set out to provide a solution for the death case,[41] it turns out that the death case is also an interesting case because of what it enables us to learn about tort theory more generally. This is because it is unique in that (1) there is a loss incurred by a person that we can quantify (albeit in terms of happiness and not money), we can calculate "hypo-

40. As a result of the fact that, in the death cases, deterrence seems to be the only game in town, *see* Pressman, *supra* note 5 (discussing how, according to the forward-looking view, it seems that my account should, for death cases, not only be implemented in theory but also in practice, pending confirmation of my empirical estimates, of course), deterrence indeed seems to be the full picture. Therefore, it is my view that, pending those empirical estimates, we should indeed implement my account both in theory and also in practice in death cases.

41. *See* Pressman, *supra* note 5.

thetical compensation," and thus we can aim to deter; but (2) our purpose is *not* also compensation because the person to whom the compensation would be due no longer exists. As a result, in determining the damages sum, we can focus exclusively on deterrence. I have argued, contra the various authors who are proponents of VSL, that when we focus exclusively on deterrence, it should be the *defendant's* utility curve that we focus on. On the other hand, in cases where the victim is not dead, the backward-looking account of tort law would typically keep us thinking in terms of the plaintiff's utility curve (due both to intrinsic backward-looking considerations and instrumental ones). As a result, I think that in typical (non-death) cases, we fail to see that the deterrence aspect of the issue is actually something that should involve analysis of the defendant's utility curve.

It is the death case, however, that helps separate the moving parts and thus helps us arrive at these conclusions. But even once this separation occurs, the authors who are proponents of VSL simply assume that we should be using the plaintiff's utility curve,[42] and this is because we seemingly always use the plaintiff's utility curve. But this is a mistake. Once we are focused only on deterrence, as we are in the death case, we no longer are constrained by the compensation norm, and we must recognize this and realize that we must then shift our focus to the defendant's utility curve.

These insights are important not only for the purpose of bringing about the best rules in the context of death. In addition, these insights help us to better understand what is relevant for the purposes of deterrence, more generally. To the extent that one thinks that deterrence is at least one relevant part of the picture in cases where compensation is possible (i.e., in non-death cases), the considerations I discuss here should inform ways of thinking about how to fashion remedies that in varying degrees, in different cases, further both a backward-looking goal *and* a forward-looking goal.

D. Summary regarding the two functions of Part II

Taking stock, this Part has had two functions. First, it extended my arguments and findings for the context of hedonic-loss damages in wrongful death suits, turning them into broader arguments and findings for the context of tort law on the whole. Second, it operated as a defense of the narrower version of my theory (which applied just to hedonic-loss damages in

42. *See, e.g.*, Posner & Sunstein, *supra* note 4; Sunstein, *Valuing Life: A Plea for Disaggregation*, *supra* note 17; Sunstein, *Lives, Life-Years, and Willingness to Pay*, *supra* note 17; Sunstein, *The Value of a Statistical Life: Some Clarifications and Puzzles*, *supra* note 17; SUNSTEIN, VALUING LIFE: HUMANIZING THE REGULATORY STATE, *supra* note 4; Cooter & DePianto, *supra* note 4; Polinsky & Shavell, *supra* note 4; Hersch & Viscusi, *supra* note 4.

wrongful death suits). It operates in this way because it can be read as staving off a few related objections that could be raised against my account (both against my broader account and against the narrower account in the context of hedonic-loss damages for wrongful death). To the extent that it staves off any such objections against the theory in general, it also supports the theory's specific application to wrongful death cases.[43]

III. OUTLOOK

What then are we to do in terms of damages for non-death cases? Should we employ the proposal that I espouse in the context of death cases and thus take an exclusively forward-looking approach to tort damages? For the various reasons offered in Part II, the answer seems to be that we should not. But should we instead stick entirely with current practices? The answer depends on a number of things. First, it depends upon on the relative weight (anywhere from zero to one hundred percent) that one thinks the intrinsically backward-looking and intrinsically forward-looking accounts should get, respectively, in dictating our approach to tort law. If one thinks that the backward-looking account should get one hundred percent weight and the forward-looking account should get zero percent weight, then the answer is that we should not employ my death-case proposal in the non-death context. If, however, one thinks that the forward-looking account should get at least some weight, we then must ask further questions. The first such question is about whether, *even according to my forward-looking account*, my proposal would even be best on forward-looking terms. For the various practical reasons I have considered, it is possible, as an empirical matter, that the answer might be that, even according to the forward-looking account, my proposal should not at all be employed, or it might be that the answer would be that it should be employed to a certain extent. If it turns out that the answer to this second question is that it should not be employed at all, that, again, ends our inquiry and the conclusion would be that in non-death cases we should not employ my proposal. If, however, our answer to the second question is that, according to a forward-looking account, we should employ my proposal to at least some extent (and if—as, indeed, is the case, since our inquiry didn't end after answering the first question—the answer to the first question was that a forward-looking ac-

43. It's important for the reader to keep in mind, though, that for the purposes of my arguments regarding a framework for approaching damages in wrongful death suits for decedents' hedonic loss, I need not offer a comprehensive theory of tort that is broad enough to also handle every other kind of case. The reader need not accept my account as a comprehensive one to accept it as fruitful for the unique context of damages for a decedent's hedonic loss in wrongful death suits.

count should at least constitute a non-zero-percent part of the picture in formulating tort law), then we reach a third question: How do we best fashion a rule that employs both the backward-looking account's and the forward-looking account's prescriptions in a way that gives each of them the relative amount of weight in dictating the overall rule that effectuates our assessment of how much relative weight their prescriptions should get?

All three of these questions present their own unique challenges, and answering them will be no easy task. Further, for each of the three questions, there will likely be people who staunchly and perhaps unreconcilably disagree as to which answers are the most plausible. What, then, are we to do? What do I propose?

One option here would be to leave it to the jury to answer these questions. But this seems as though it would be the wrong approach. Questions regarding damages—and especially regarding non-economic damages, and, even more especially, regarding non-economic damages for lost years of life—are already difficult enough and intractable enough for jurors. We need jurors to have *more* guidance and not *less* guidance; we need to bring about *greater* consistency and rationality in damages (and thus greater horizontal equity among plaintiffs), not less. Opening up the three questions that I have posed to the jurors themselves seemingly would be a recipe for extreme turmoil.

A second option might be to put the decision-making regarding these three questions in the hands of judges. In other words, even in jury trials, perhaps these prior questions could be decided by the judges and brought into effect by their decisions of how to articulate the jury instructions. The jurors could then decide the downstream questions of fact that have been left for them to answer. Although this would likely be a better approach than leaving it to the jurors to answer these three initial questions, this approach, too, would likely be a recipe for extreme turmoil because of the enormous differences that would likely exist between how different judges answer each of the three questions. Thus, there would likely be enormous inconsistency, horizontal inequity, and perhaps a lack of predictability. Further, this would likely be the case, even assuming all judges are thoughtful and reasonable in their decision-making. There simply would be too much room for disagreement even among reasonable minds.

Although, in this Article, I will stop short of conclusively espousing a particular approach regarding how the three questions should be answered and by whom they should be answered, I do, here, offer a tentative suggestion. In my view, it seems that these questions are likely best addressed by state legislatures. Although there might then still be large differences

among different states, there will then at least be uniformity within jurisdictions. Further, the policy decisions implicated by the three questions—and, in particular, the aspects of the questions that have empirical components—seem well-suited to the legislature. This is not to say that there might not be some aspects of these questions that would be better answered by judges, though, and perhaps the best approach would indeed be some version of a legislative-judicial hybrid approach to addressing the three questions.

I leave for another day the task of determining more conclusively which approach is best, but, for the time being, I hope to have sowed the seeds for productive discussion.